

3 1761 11556006 2



Task Force on the
Future of the
Canadian Financial
Services Sector

AI
FN 800
-1996
F054

Government
of Canada


Mechanisms for Public Participation in Economic Decision-making

1. A Description of Experiences
2. Three Case Studies of Foreign Bank Mergers

by
Jean Roy, Ph.D.

September 1998

Research Papers Prepared for the Task Force on the Future
of the Canadian Financial Services Sector



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761115560062>



Task Force on the
Future of the
Canadian Financial
Services Sector

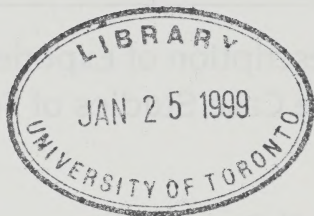
Mechanisms for Public Participation in Economic Decision-making

1. A Description of Experiences
2. Three Case Studies of Foreign Bank Mergers

by
Jean Roy, Ph.D.

September 1998

Research Papers Prepared for the Task Force on the Future
of the Canadian Financial Services Sector



The views expressed in these research papers
are those of the authors and do not necessarily reflect
the views of the Task Force on the Future of the
Canadian Financial Services Sector

Cat No.: BT22-61/3-1998E-16
ISBN 0-662-27155-6

For additional copies of
this document please contact:
Distribution Centre
Department of Finance
300 Laurier Avenue West
Ottawa K1A 0G5

Telephone: (613) 995-2855
Facsimile: (613) 996-0518

Also available through the Internet at
<http://finservtaskforce.fin.gc.ca>

Cette publication est également disponible en français.



A Description of Experiences

Table of Contents

1. Introduction	7
2. Public Participation: Definition, Social Context and Scope	8
Definition	8
Social Context	8
<i>Positions of Public Sector Stakeholders</i>	8
<i>Structures from the Private Sector</i>	9
Scope of Public Participation	10
3. Public Participation in the Non-financial Sector	12
Public Participation in Environmental Decision-making	12
<i>Canadian Environmental Assessment Agency</i>	12
<i>United States Environmental Protection Agency (EPA)</i>	13
<i>Bureau d'audiences publiques sur l'environnement du Québec (BAPE)</i>	13
Public Participation in the Field of Communications	13
Public Participation in the Energy Field	14
Public Participation in the Field of Transportation	14
Summary of Mechanisms for Public Participation in the Non-financial Sector	15
4. Public Participation in the Financial Sector Abroad	16
The United States	16
The United Kingdom	16
Switzerland	17
Australia	19
France	20
Germany	20
5. Public Participation in the Financial Sector in Canada	21
Public Participation at the Competition Bureau	21
Public Participation at the Office of the Superintendent of Financial Institutions	22
Public Participation at the Department of Finance	22
6. Conclusion	24
References	25

1. Introduction

Modern societies are based on individual initiative and freedom. In general, citizens exercise their authority through an electoral process that enables them to participate in choosing a representative. However, where important issues are concerned, citizens are no longer satisfied with the delegation approach and wish to have their voices heard through direct participation.

Certain societies, as in Switzerland for example, have a longstanding tradition of direct democracy and routinely use referendums to decide on major issues that affect the community.

Today, a more highly educated and better informed public is becoming increasingly aware of the consequences of major economic decisions and would like to be able to put forth its point of view. At the same time, technological progress in the field of communications is opening up new possibilities for public participation in collective decisions. There are already a number of examples of public participation in the non-financial sector, particularly in the area of environmental protection.

With the federal initiative to review the legislation concerning the financial services sector, which will have a major impact on the general public, this is an appropriate time to examine the possibilities for public participation in determining the shape of this sector.

Further to the mandate received by the Task Force on the Future of the Canadian Financial Services Sector, this initial document will endeavour to identify and describe the mechanisms for public participation in economic decision-making.

First, we will attempt to shed light on the phenomenon of public participation by defining it, by describing the social context that surrounds it and by exploring the scope of this undertaking. Second, we will give an overview of public participation in the non-financial sector, focusing on the environment, communications, energy and transportation. Third, we will examine the mechanisms for public participation in the financial sector abroad. Fourth, on the basis of this overview, we will analyze the possibilities for public participation in the financial sector in Canada, particularly from the point of view of the proposed mergers of major financial institutions. The conclusion will identify the most promising elements and will propose avenues for continuing this endeavour.

2. Public Participation: Definition, Social Context and Scope

Definition

In providing a suitable framework for our analysis, it may be useful to begin by clarifying what is meant by "public participation" in economic decision-making. The United States Environmental Protection Agency (EPA) gives a very good definition of the public participation process:

"Officially speaking, EPA uses the term "public participation" to denote the activities where permitting agencies and permittees encourage public input and feedback, conduct a dialogue with the public, provide access to decision-makers, assimilate public viewpoints and preferences, and demonstrate that those viewpoints and preferences have been considered by the decision-makers (see 40 CFR 25.3(b)).

"The public" in this case refers not only to private citizens, but also representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labour organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations (see 40 CFR 25.3(a)). When one considers "the public" in this broad sense, *public participation can mean any stakeholder activity carried out to increase the public's ability to **understand and influence** the RCRA permitting process.*¹

The EPA continues by emphasizing the fact that public participation is a tripartite communication process that involves government, the business in question and the public – a process which, in its view, must be characterized by dialogue between all parties.

Social Context

Before examining the scope of public participation in economic decision-making, it would be appropriate to present the principles set out by a number of major stakeholders in order to more fully understand the context surrounding this undertaking.

Positions of Public Sector Stakeholders

The interest in increased public consultation in regulatory decisions has been detailed by the Organization for Economic Cooperation and Development as follows:

¹ United States Environmental Protection Agency, *RCRA Public Participation Manual*, 1996 Edition, p. 2-1

"A strong trend toward renewal and expansion of public consultation in regulatory development is underway in OECD countries. Much has been invested in efforts to make more information available to the public, to listen to a wider range of interests, to obtain more and better information from affected parties, and to be more responsive to what is heard. A well-designed and implemented consultation programme can contribute to higher-quality regulations, identification of more effective alternatives, lower costs to businesses and administration, better compliance, and faster regulatory responses to changing conditions. Just as important, consultation can improve the credibility and legitimacy of government action, win the support of groups involved in the decision process, and increase acceptance by those affected."²

The Government of Canada also recognizes the importance of public consultation. A document produced by the Treasury Board Secretariat reads as follows:

"Canadians desire and demand more direct involvement in government decision-making. Parliamentary institutions provide for the democratic representation of all Canadians. Canada's democratic political traditions provide for the establishment of broad public policy directions and priorities. **Accordingly, it is the policy of the Government of Canada to pursue and to promote consultation with Canadians in the development of public policy and in the design of programs and services.**"³

Without having a public policy, the Task Force on the Future of the Canadian Financial Services Sector has encouraged public participation in a number of ways, and the public has responded by submitting more than 200 documents.

It can thus be seen that there is an awareness and a positive and proactive attitude within the public sector in general towards public participation in collective decisions.

Structures from the Private Sector

At the same time, citizens, who used to react to situations without being asked, today have structures to enable them to participate more effectively in decision-making. At the international level, the International Association for Public Participation (IAP2) describes its mission as follows:

² OECD, Public Consultation, August 1996, p. 1.

³ Treasury Board Secretariat, *Consultation Guidelines for Managers in the Federal Public Service*, p. 1. Bold in original.

"The International Association for Public Participation was established in 1990 as a non-profit corporation to advance the practice of public participation. IAP2 is an association of members who seek to promote public participation in relation to governments, institutions and other entities that effect the public interest in nations throughout the world. IAP2 carries out its mission by organizing and conducting activities to: Serve the learning needs of members through events, publications and communication technology; Advocate for public participation throughout the world; Promote a results-oriented research agenda and use research to support educational and advocacy goals; and Provide technical assistance to improve public participation."⁴

In the United States and Canada, the Public Involvement Network (PIN), which is associated with the IAP2, has the same objectives and represents a number of local groups, including one in British Columbia and one in Ontario.

In Canada, the University of Guelph has a web site dedicated to the promotion of participation, entitled the Participatory Development Resource Centre.

In the financial sector, in recent years the public has regularly submitted unsolicited briefs to government through such organizations as the Canadian Manufacturers' Association, the Consumers' Association of Canada, the Associations coopératives d'économie familiale and l'Association de protection des épargnants et investisseurs du Québec, directed by Yves Michaud.

Lastly, a recent article by Desmond M. Connor provides an overview of public participation in Canada.⁵

It will thus be noted that the private sector has created and set up a variety of structures and organizations to enable it to more effectively participate in major decisions which may affect it.

In short, both decision-makers within the public sector and citizens themselves realize the importance of the social process constituted by public participation in collective decisions which have far-reaching implications. This attempt to examine the potential for public participation in shaping the financial sector is therefore in keeping with this social trend.

Scope of Public Participation

As we have seen, public participation in policy development is now an established principle. The question that now arises is the following: "Should the public also participate in individual decisions which involve applying policies to specific cases?" This question can be addressed from the point of view of effectiveness and efficiency.

⁴ International Association for Public Participation, Mission Statement, Web site (<http://www.pin.org/mission.htm>)

⁵ Connor Desmond M., *Public Participation in Canada: Development, Current Status and Trends*, 5 p. Text available at the following Internet address: <http://www.islandnet.com/~connor/ppcanada/ppcanada.html>.

With regard to effectiveness, three hypotheses may be formulated concerning the public's contribution to decision-making. The first hypothesis would be that of no contribution. Since the public does not have a command of all the technical aspects of a problem and the variety of opinions expressed by the public, the only effect would be that of adding noise to the decision-making process without, however, affecting it. It could be considered that, if the policy that has been developed is sufficiently detailed, its application would be clear and may be delegated to professionals within the public service. Thus, public participation becomes unnecessary.

The second hypothesis would be that of a negative contribution. The fact that groups perceive only their own interests and are incapable of seeing the collective interest could cause them to exert an undue and negative influence on certain decisions.

The third hypothesis would be that policies always leave a certain amount of room for interpretation and that the public can contribute to determining how this flexibility could be applied. Accordingly, it must be noted that decisions often become precedents which, in practice, serve to define policies. The public could thus make a positive contribution to decision-making in two ways: by helping to find a practical compromise between the different objectives of a policy and by providing original information concerning the various options.

With regard to efficiency, it must be asked whether the potential benefits of public participation outweigh the financial and time costs.

This document will therefore endeavour to take stock of experiences with public participation in economic decision-making in order to provide information which will shed a certain amount of light on the many questions that have just been raised. In particular, it will attempt to identify the circumstances and mechanisms of participation which are most likely to lead to a positive contribution by the public in the decision-making process. To that end, we will begin by examining experiences in the non-financial sector and will then turn to the financial sector abroad.

3. Public Participation in the Non-financial Sector

This section gives an overview of the mechanisms for public participation in economic decision-making in the non-financial sector. Four areas will be considered: the environment, communications, energy and transportation. The examples are taken from Canada and the United States.

Public Participation in Environmental Decision-making

Environmental protection is most likely the area in which public participation in decision-making is the most intense and takes the widest variety of forms. We will be examining here the approaches taken by three organizations: the Canadian Environmental Assessment Agency, the United States Environmental Protection Agency and Quebec's Bureau d'audiences publiques sur l'environnement.

Canadian Environmental Assessment Agency

The Canadian Environmental Assessment Agency (CEAA)⁶ uses four major approaches: screening, comprehensive study, mediation and panel review. These four methods can be grouped under two major categories: self-assessments conducted by the authority responsible for the project and independent assessments.

When screening or a comprehensive study (which come under the category of self-assessments) takes place, public participation is left to the discretion of the authority in question. A record of the assessments that are being carried out is available to the public. Citizens can provide their input either spontaneously or upon request. Their participation can take place before or after the report is written. It must be noted that, although public participation is perceived favourably, it is not strictly necessary to this process.

On the other hand, if mediation or panel review (which are methods of independent assessment) takes place, public participation is an integral part of the process. During mediation, which is not necessarily open to the general public, the parties directly affected by a particular project are called to negotiate a compromise. When a panel review takes place, preliminary meetings may be held to identify the major issues. The project proponent will then be required to prepare an Environmental Impact Assessment which will need to address the major issues. Public hearings will then be held, and the public will have a 60-day period to comment on the panel's draft report.

The CEAA also has a financial assistance program in order to help the public participate in its work.

⁶ Canadian Environmental Assessment Agency, *The Citizen's Guide*, 1994

United States Environmental Protection Agency (EPA)

The EPA has prepared a lengthy document entitled the *RCRA Public Participation Manual*⁷ in connection with the *Resource Conservation and Recovery Act* (RCRA). This manual contains four main chapters (2 to 5). Chapter 2 defines public participation and sets out the conditions necessary to its success. Chapters 3 and 4 detail the potential for public participation in connection with the granting of permits and corrective action procedures respectively. Chapter 5 gives a long presentation (143 pages) of all the possible ways to disseminate and collect information. For each of these methods, the EPA gives the regulatory constraints, a detailed description of the activity, the level of effort required, the way the activity should be carried out, the circumstances in which it should be used, activities that can be used in conjunction with it, its advantages and limitations, and a checklist. Lastly, EPA's attitude is to gear the level of the participation method used to the public's level of interest in the project.

Bureau d'audiences publiques sur l'environnement du Québec (BAPE)

The BAPE⁸ process begins with the Minister informing the project proponent of the nature and scope of the impact assessment to be carried out. When the document that has been produced is deemed to be acceptable, it is made available for public consultation for 45 days. During this period, the public can request that public hearings be held. If the request is deemed not to be frivolous, the Minister asks the BAPE to hold inquiries and public hearings.

Hearings take place in two parts. The first part consists in providing information. The proponent presents its project and its impact assessment to the public. After this first part, the public has 21 days to prepare briefs. During the second part, the panel hears briefs from the public. Lastly, the panel members appointed by the BAPE prepare a summary report which is submitted to the Minister for decision-making purposes. The Minister can also assign the BAPE a mediation mandate, depending on the circumstances.

Public Participation in the Field of Communications

This section will discuss the role of public participation in the work of the Canadian Radio-Television and Telecommunications Commission (CRTC)⁹.

First, it should be noted that the CRTC makes all relevant documents available to the public. The CRTC then uses two primary ways of interacting with the public: written and oral public hearings. The CRTC receives letters and telephone calls from the public on an ongoing basis.

⁷ U.S. Environmental Protection Agency, *RCRA Public Participation Manual*, 1996, 250 p.

⁸ Government of Quebec, Bureau d'Audiences Publiques sur l'Environnement, "Pour Agir il faut savoir", 4 p.

⁹ Canadian Radio-television and Telecommunications Commission, *The CRTC and Public Participation*, 6 p.

Public Participation in the Energy Field

Businesses operating in the energy field are often involved in projects which have major environmental and social impacts. Accordingly, hydro-electric companies as well as those that provide nuclear energy and natural gas must all ensure that their projects are accepted by the public. They must therefore consult the public and ensure that it participates in major decisions.

There are a number of examples in Canada, including Atomic Energy of Canada Limited, Ontario Hydro and Hydro-Québec. In the United States, the Department of Energy has a policy of involving the public in its decision-making.¹⁰ Similarly, the Nuclear Regulatory Commission has produced an extremely interesting policy document entitled *Public Involvement in the Nuclear Regulatory Process*.¹¹

It will be noted that the later Commission relies heavily on public participation. It maintains public records of its activities. It provides the public with access to most of its documents. It involves the public in the process of developing policies and receives its comments once policies have been formulated. It also ensures that the public has an opportunity to participate in specific decisions which involve the application of these policies. It welcomes unsolicited interventions by citizens. It regularly holds public meetings on security matters. In addition, an experimental program gives the public a chance to attend one out of four disciplinary hearings. During these meetings, permitholders' compliance with standards is reviewed, and warnings and sanctions are issued against violators. The NRC thus uses a wide variety of methods to inform the public and involve it in its activities.

Public Participation in the Field of Transportation

The U.S. Department of Transportation (DOT) has made available on the Internet a document entitled *Innovations in Public Involvement for Transportation Planning*¹². In this text, 14 innovative techniques for facilitating public participation are described and analyzed. These techniques are listed below.

List of Techniques Proposed by the U.S. Department of Transportation

1. Charrette (meeting to resolve a specific problem)
2. Visioning
3. Brainstorming
4. Citizen's Advisory Committee
5. Transportation Fair
6. Focus Groups

¹⁰ US Department of Energy, *Stakeholder Involvement in the Necessary and Sufficient Process*, 6 p.

¹¹ US Nuclear Regulatory Commission, *Public Involvement in the Nuclear Regulatory Process*, 6 p.

¹² The text can be found at the following site: <http://www.pin.org/library/lha&fta.htm>.

7. Collaborative Task Force
8. Media Strategies
9. Facilitation
10. Citizen Survey
11. Telephone Techniques
12. Video Techniques
13. Public Meetings and Hearings
14. Americans with Disabilities (participation specific to this group)

The comments of the DOT on the "Citizen's Advisory Committee" method are provided by way of example. The DOT notes that, despite the existence of a number of potential difficulties, this approach was extremely positive in several cases. A citizen's advisory committee can be used in several different ways: to contribute to the development process, to anticipate objections and to negotiate solutions for specific projects.

Summary of Mechanisms for Public Participation in the Non-financial Sector

In short, a strong culture of public participation has developed in certain areas of the non-financial sector, such as the environment, communications, energy and transportation. A wide variety of methods is used to provide the public with access to the decision-making process.

The public is advised of organizations' activities and has access to documents. It can participate in policy development. It can comment on proposed policies. It can participate in individual decisions. It can contribute spontaneously to the process or be invited. It receives and provides information. It may become a participant in a negotiation process. Its participation can be either ad hoc or institutionalized through an advisory committee.

A wide variety of communication techniques is used in order to implement all of these mechanisms: face-to-face meetings, hearings, written documents, telephone and fax, e-mail and the Internet, and sometimes even radio and television.

At some point the potential for and the appropriateness of using similar approaches in the Canadian financial sector will need to be assessed. But first let us examine the phenomenon of public participation in the financial sector abroad.

4. Public Participation in the Financial Sector Abroad

In this section we will examine experiences abroad with two aims in mind: finding out what sorts of processes are used to authorize mergers of financial institutions and identifying mechanisms for public participation in the financial sector, particularly with regard to mergers.

The United States

According to the 1960 *Bank Merger Act*, regulatory authorities (whether the Federal Reserve Bank, the Office of the Comptroller of the Currency or the Federal Deposit Insurance Corporation) must authorize any proposed merger of financial institutions, in conjunction with the Department of Justice. The latter concentrates its attention on the impact of the transaction on the level of competition and applies the policy set out in the document entitled *Horizontal Merger Guidelines*¹³. In a speech before the New York Bar, the Director of Operations of the Antitrust Division of the Department of Justice indicated that experience had brought them to focus their attention on the credit market for small- and medium-sized businesses, the market most strongly affected by bank mergers.¹⁴

The authorities must also assess the impact on the stability of the financial system and on the level of service currently offered to the public. It is possible for the review process to be open to the public and for it to include public hearings. Most of these hearings pertain to access to financial services and credit. In its monthly newsletter and on its web site, the Federal Reserve Bank announces public hearings and publishes texts that describe decisions that have been made and the reasons behind them.

The United Kingdom

First, let us note that the HM Treasury has a code of practice for consultation.¹⁵ This document describes the basic approach that is used to obtain comments with regard to the government's fiscal policy.

In addition, the Financial Services Authority (FSA), a newly-formed comprehensive regulatory agency, is currently looking at public involvement in its activities and has published three consultation documents.

The first document is entitled *Consumer Involvement*¹⁶. Its primary recommendation is to create a permanent advisory group called the Consumer Panel. This group would have two primary roles: to make recommendations, and to comment on FSA policies and report to the FSA

¹³ U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, April 1992, 28 p.

¹⁴ C.K. Robinson, *Bank Mergers and Anti-trust*, Antitrust Division, Department of Justice, September 1996, 6 p.

¹⁵ U.K. Her Majesty's Treasury, *Code of Practice on Consultation*, 9 p.

¹⁶ U.K. Financial Services Authority, *Consumer Involvement*, October 1997, 14 p.

concerning the effectiveness of its policies from the consumer's point of view. In addition, the FSA is considering the following methods to improve public involvement:

- Establishing direct relationships with consumers' groups
- Making use of ad hoc and permanent participation mechanisms as required
- Systematically using the information contained in consumers' complaints
- Supporting research into financial services both within and outside the FSA.

The second document, *Practitioner Involvement*¹⁷, examines the possibility of creating one or more advisory groups made up of practitioners from within the financial community. The third document, *Consumer Complaints*¹⁸, analyzes mechanisms for implementing a comprehensive service for dealing with consumer complaints. This service would be headed up by an ombudsman who could recommend compensation for complainants.

The analysis contained in these three documents is highly relevant and proposes innovative solutions to current problems. In our view, it is a source of inspiration which can make an extremely worthwhile contribution to the structural development currently taking place in Canada.

Switzerland

Switzerland is an extremely interesting case for a number of reasons: it has a longstanding tradition of direct democracy, its financial sector is strong, and it is currently reviewing a proposed merger between the Union Bank of Switzerland and the Swiss Bank Corporation, one of the largest such transactions in the world.

This transaction is subject to approval by the Swiss Cartel Commission, which must render a decision within 120 days. The Commission is made up of 15 independent members appointed by the government. It carries out its mandate in consultation with the Federal Banking Commission, which serves as the supervisory agency.

Section 43 of the federal *Cartel Act* sets out the terms and conditions for participation by third parties in the review of the proposed merger. It is reproduced in its entirety below:

"Article 43: Participation of third parties in the investigation

1. The following may come forward in order to take part in an investigation concerning a restraint of competition:
 - a) Persons who cannot gain access to or exercise competition because of a restraint of competition;

¹⁷ U.K. Financial Services Authority, *Practitioner Involvement*, October 1997, 16 p.

¹⁸ U.K. Financial Services Authority, *Consumer Complaints*, December 1997, 38 p.

- b) Professional or economic bodies whose bylaws authorise them to defend their members' economic interests, inasmuch as members of the body or of one of its sections may take part in the investigation;
 - c) Organisations of national or regional importance which work for consumer protection under the terms of their bylaws.
2. The Secretariat may require groups of more than five participants in an investigation having identical interests to appoint a common representative if, not doing so, would excessively complicate the investigation. It may if necessary limit participation in a hearing: the rights of parties deriving from the Act on administrative procedure are reserved.
 3. Paragraphs 1 and 2 above are applicable by analogy to the procedure whereby the Federal Council grants exceptional authorisation for an unlawful restraint of competition (Article 8).
 4. In the investigation procedure for concentration of enterprises, only enterprises taking part have the status of parties."

It can be seen that this article clearly provides for public participation in the review process. It nonetheless establishes a specific framework for this privilege by identifying those parties that may submit representations and by providing for the right to limit interventions so as not to create undue delays.

In addition, with regard to the impact on their employees of the merger between the two banks, the press release reproduced below shows that employees had an opportunity to participate in the downsizing process through each bank's personnel commission, the Swiss Association of Bank Employees and the Swiss Association of Commercial Employees. An agreement has already been signed between all the parties, except for the latter, with regard to human resources management following the merger. Lastly, a special commission consisting of two representatives from each of the groups that signed the agreement will supervise its application over the next four years.

"Merger partners SBC and UBS agree innovative redundancy plan

Swiss redundancies resulting from the merger of Swiss Bank Corporation (SBC) and Union Bank of Switzerland (UBS) will be handled with the greatest possible fairness and social integrity. This has been agreed between negotiators from the merger partners SBC and UBS, the personnel commissions of the two banks, the Swiss Association of Bank Employees and the Swiss Association of Commercial Employees. Generous and innovative solutions have been agreed for all four elements of the package: early retirement, relief and incentives, severance payments and new working models. The central board of the Swiss Association of Commercial Employees has still to give its definitive approval to the agreement.

However, the redundancy plan, signed by the other parties, will take effect simultaneously with the merger. The Association of Commercial Employees will have the opportunity to sign the agreement subsequently.”¹⁹

Australia

Australia’s case is also interesting for several reasons. This country has economic and cultural similarities with Canada. It has just completed a review of the structure of its financial system known as the Financial System Inquiry (FSI)²⁰. Furthermore, government authorities have recently had to examine a major merger involving Westpac Banking Corporation and the Bank of Melbourne Limited.

In Australia, proposed mergers of financial institutions must be authorized by two entities: the Australian Competition and Consumer Commission (ACCC) and the Australian Treasury. In its second brief to the FSI, the ACCC described its role in relation to the financial system. In particular, Chapters 2 and 3 discuss merger policies and procedures. Chapter 10 of the final FSI report also deals with this subject.

In the final analysis, the document we feel is the most important is the ACCC’s Merger Guidelines. Chapter 6 details the authorization process. The ACCC has a relatively short period for rendering decisions: thirty days. Nonetheless, the process is very clearly defined as being a public process. Section 6.8 reads as follows:

6.8 The authorization process is a public process, in which any interested party may make a submission, submissions are open for inspection on a public register, and there may be provision for a conference of interested parties. There is, however, provision for maintaining confidentiality of commercially sensitive information or otherwise where it appears desirable to the Commission to grant confidentiality”²¹

Sections 6.18 to 6.27 set out the terms and conditions governing public participation in the ACCC’s review process.

Finally, in the document²² that explains its decision regarding the proposed merger between Westpac and the Bank of Melbourne, the ACCC states it has requested opinions from some 100 stakeholders. It says it has received over 30 significant contributions and another

¹⁹ Swiss Bank Corporation, press release, January 30, 1998, Complete three-page text available on the Corporation’s web site: <http://www.swissbank.ch>.

²⁰ Commonwealth of Australia, *Financial System Inquiry Final Report*, March 1997

²¹ Australian Competition and Consumer Commission, *Merger Guidelines*, chapter 6

²² Australian Competition and Consumer Commission, *Westpac Banking Corporation/Bank of Melbourne Limited – Background to Decision on Merger Proposal*, 1997, 38 p.

30 unsolicited briefs, and that it has reviewed all of these documents. It will thus be noted that Australia attaches a great deal of importance to public participation in the authorization process for mergers of financial institutions.

France

In France, three organizations, all of which are part of the Bank of France, share responsibility for supervising the financial system. These organizations are the Comité de réglementation bancaire et financière (CRBF), the Comité des établissements de crédit et des entreprises d'investissement (CECEI) and the Commission bancaire (CB). The CECEI is responsible for granting charters to financial institutions and decides whether or not to authorize mergers between them.

Although there are a few major institutions, the French banking system consists of almost 400 institutions. Government authorities consider it to be relatively fragmented and look favourably upon a certain degree of consolidation within the sector. Consequently, the authorization process does not provide for public consultation and the only organizations that may be asked to provide an opinion are the Commission des opérations de bourse and the Conseil des marchés financiers.

Germany

Germany has a widely dispersed banking system with over 3,400 institutions. Accordingly, mergers between financial institutions are not subject to special authorization by financial authorities and simply need to satisfy the Federal Cartel Office and ultimately the European Commission.

Because the three largest private banks (Deutsche, Dresdner and Commerz) hold only 10 percent of the domestic market²³ between them, there is little concern about the reduced competition that a merger could produce. Accordingly, the merger proposal between the Bayerische Vereinsbank and the Bayerische Hypotheken-und-Wechsel Bank, respectively the fourth and fifth largest private German banks, was approved without difficulty in July 1997. Similarly, the merger of the Bankgesellschaft Berlin and the Norddeutsche Landesbank was approved easily in May 1997.²⁴

²³ The April 1998 monthly statistical report from the Deutsche Bundesbank states that, at the end of February 1998, the three largest German banks held domestic shares worth DM 928 billion, or 10.08%, compared to the DM 9215 billion held by all of the other credit institutions combined.

²⁴ Aucoin M., *Bayerische Vereinsbank and Hypo-Bank Merger*, Canadian Embassy, Berlin, July 1997, 3 p.

5. Public Participation in the Financial Sector in Canada

In this section we will be considering the possibilities for public participation in the Canadian financial sector in light of the information that has been gathered concerning public participation in the non-financial sector and in the financial sector abroad. Specifically, we will address this question from the point of view of proposed mergers between major financial institutions.

In its preliminary report of July 1997, the Task Force on the Future of the Canadian Financial Services Sector proposed to the government a three-part analytical process for proposed mergers. First, the Competition Bureau should study the impact of the transaction on the level of competition. Second, the Office of the Superintendent of Financial Institutions should determine the impact on the soundness and stability of the financial sector. Finally, the Department of Finance should examine the consequences of the transaction on the public interest.

We will now attempt to determine the potential for public participation in this area. To that end, each of the three stakeholders will be considered in turn.

Public Participation at the Competition Bureau

The Competition Bureau has structured its approach as follows. First, it has prepared a document²⁵ in which it describes how it would apply its general standards to the financial sector in specific. It then submitted this document to the Task Force last November. The document is currently being made available for consultation and can be accessed through the Task Force's site and through that of the Competition Bureau. A public notice was disseminated through the Canada Gazette. At the same time, the Bureau invites the public to provide information or make comments concerning the specific merger proposals. In addition, the Bureau uses a list of approximately 200 contacts which it consults systematically on its policies and decisions.

In short, the Bureau has a very clear action plan and a well-organized public consultation approach, with regard to both development of its procedures and their application to specific cases. It should be noted that the Bureau could make use of other methods if circumstances warrant.

²⁵ Competition Bureau, *The Merger Enforcement Guidelines as Applied to a Bank Merger*, Preliminary draft for consultation purposes, 1997, 36 p.

Public Participation at the Office of the Superintendent of Financial Institutions

The question that the Office of the Superintendent of Financial Institutions will need to address, that is, the impact on the soundness and stability of the financial system, is relatively specialized and technical. It is likely that few members of the public would feel that they were able to contribute to this analysis. Nonetheless, the OSFI will receive whatever comments the public would like to send it. If warranted by circumstances, the Superintendent can apply a provision (SOR/92-308) of the *Bank Act* that authorizes it to institute public inquiries. In fact, the Superintendent has a great deal of discretion to take whatever measures it deems appropriate. Lastly, we think that the OSFI could also consider preparing a document similar to that of the Competition Bureau that would describe how it intends to carry out the analysis requested of it and could implement a consultation process for this document.

Public Participation at the Department of Finance

In accordance with the Task Force's suggestion, the Department of Finance should analyze the impact of a bank merger on the public interest by considering the following elements: the ability of financial institutions to compete at the international level, advantages for customers, the impact on employment, the adoption of innovative technologies and the value in terms of setting a precedent. It is clear that this vast undertaking opens up many possibilities for public participation.

The Department of Finance is currently receiving comments and unsolicited contributions from the public. The possibility of further developing channels for interaction with the public is being examined. It should be noted that, through the Task Force, the Minister has already received some 200 contributions from the public. With regard to the analysis of specific merger proposals, the Minister has the authority to use whatever means he sees fit. In particular, he could decide to have recourse to a parliamentary committee which could hear submissions from a wide range of citizens.

In light of the overview we have given in the previous sections, we believe that the Minister of Finance could consider the following measures with regard to public participation:

1. It could attempt to draft a document similar to that of the Competition Bureau which would describe how it intends to measure the elements referred to above as they affect the public interest. This document could then be subject to public consultation.
2. It could implement a process to identify the public's major concerns regarding bank mergers and to measure the intensity of the public's desire to participate in the decision-making process. Various techniques can be used for this purpose: interviews, surveys, focus groups and scoping meetings.

3. It could ask the businesses involved in the proposed merger to prepare a document which would contain a Social Impact Assessment and which would address each of the criteria the Department must take into account in assessing the impact on the public interest.²⁶ The procedure would be similar to that used during environmental impact assessments. This document could be made public and could be opened up to comments from the public.
4. It could study the appropriateness of creating a permanent advisory structure and the possible components of such a structure. To that end, it could use as a point of departure the Financial Services Authority document entitled Consumer Involvement. Note that the U.S. documents produced by the Environmental Protection Agency and the Department of Transportation also contain interesting analyses of this approach to public participation.

²⁶ We note that Holland has a similar provision in place. Below is the complete text of article 22 of Chapter III of the "Resolution of the 1975 Social and Economic Council on the Rules Governing Mergers". This resolution is still in force.

"Notification of Mergers to Government

Article 22

1. The persons who are required to make the notifications to the Committee prescribed by Article 21 paragraph 1 shall inform the Minister at his request of their reasons for contemplating the merger and of the expected economic and social consequences, where they can be assessed at that moment.
2. If the Minister desires more detailed information in order to help him form his opinion, this shall be given by the boards where possible.
3. The information supplied to the Minister under this Article shall be confidential, unless the board of the enterprise concerned has stated otherwise."

6. Conclusion

At the end of the first phase of this undertaking, our major findings are as follows. First, it is clear that certain fields within the non-financial sector, such as the environment, communications, energy and transportation, have implemented highly-developed mechanisms for public participation, which the financial sector would probably do well to use as models. In particular, the Environmental Protection Agency's *Public Participation Manual*, with its comprehensive inventory of techniques, is an important reference work. The Canadian Environmental Assessment Agency also offers some interesting material concerning the various approaches to reviewing a project (screening, comprehensive study, mediation and panel review).

In the financial sector, we have identified several countries which have strong financial systems and which have implemented mechanisms for public participation. In particular, the United States, Australia and Switzerland have developed review processes for proposed mergers of financial institutions which provide for submissions from the public. For the second phase of this undertaking, we are therefore proposing that the procedures set out in each of these countries be more thoroughly examined. Specifically, we would suggest a review of the merger of the First Union Corporation and the CoreStates Corporation in the United States, the Westpac Corporation-Bank of Melbourne merger in Australia and the Union Bank of Switzerland and the Swiss Bank Corporation merger in Switzerland.

References

Canada

Report of the Task Force on the Future of the Canadian Financial Services Sector, in response to the request of the Secretary of State (International Financial Institutions), July 11, 1997, 13 p.

Industry Canada, Submission of the Director of Investigation and Research – Competition Bureau to the Task Force on the Future of the Canadian Financial Services Sector, November 1997, 89 p.

Treasury Board of Canada, Consultation Guidelines for Managers in the Public Service, 4 p.

Connor Desmond M., Public Participation in Canada: Development, Current Status and Trends, 5 p.

Canadian Environmental Assessment Agency, The Citizen's Guide, 1994, 31 p.

Canadian Radio-television and Telecommunications Commission, The CRTC and public participation, 6 p.

Gouvernement du Québec, Bureau d'Audiences Publiques sur l'Environnement – "Pour agir il faut savoir"

United States

U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 28 p.

U.S. Environmental Protection Agency, RCRA (Resource Conservation and Recovery Act) Public Participation Manual, 225 p.

U.S. Department of Energy, Stakeholder Involvement in the Necessary and Sufficient Process, 7 p.

U.S. Nuclear Regulatory Commission, Public Involvement in the Nuclear Regulatory Process, 6 p.

U.S. Department of Transportation, Innovations in Public Involvement for Transportation Planning, 42 p.

International

OECD, Public Consultation, 2 p.

Germany

Micheline Aucoin, Canadian Embassy in Bonn

- Bayerische Vereinsbank and Hypo-Bank Merger, 3 p., Juillet, 1997
- Background information on the German banking system and new challenges faced by German banks, 8 p., March 1997

Competition Policy Division, Checklist for Merger Control Procedures, 33 p.

Australia

Commonwealth of Australia, Financial System Inquiry Final Report – Chap. 10 Mergers and Acquisitions, March 1997, p. 417-476

Australian Competition and Consumer Commission

- Merger Guidelines
- Second Submission to the Financial System Inquiry, September 1996, 219 p.
- Westpac Banking Corporation/Bank of Melbourne Limited – Background to Decision on Merger Proposal, 1997, 38 p.

France

Banque de France, Comité des Établissements de Crédit et des Entreprises d'Investissement (CECEI), Annual Report, 1996

- Chap. 2: Financial activities requiring approval, p. 53-70
- Chap. 3: Evaluation criteria used by the committee, p. 71-88

Great Britain

U.K. Her Majesty's Treasury, Code of Practice on Consultation, 9 p.

U.K. Financial Services Authority, Consumer Involvement, 1997, 14 p.

U.K. Office of Fair Trading

- Mergers – A guide to procedures under the Fair Trading Act 1973, 40 p.
- Merger Submission – A briefing note, 12 p.

Holland

Social and Economic Council, Resolution of the Social and Economic Council on Rules relating to Mergers, 1975, 28 p.

Switzerland

Swiss Confederation, Département fédéral de l'économie, Procedure for controlling mergers in Swiss cartel law, February 1998, 2 p.

Three Case Studies of Foreign Bank Mergers

Table of Contents

1. Introduction	33
2. The Case of the First Union Corporation and CoreStates Financial Corporation Merger, United States	34
The Parties to the Merger	34
Regulatory Authority	34
The Decision-making Process and Public Participation	34
The Impact of Public Participation	37
3. The Case of the Westpac Banking Corporation and Bank of Melbourne Limited Merger, Australia	39
The Parties to the Merger	39
Regulatory Authority	39
The Decision-making Process and Public Participation	39
The Impact of Public Participation	40
4. The Case of the Union Bank of Switzerland and Swiss Bank Corporation Merger, Switzerland	41
The Parties to the Merger	41
Regulatory Authority	41
The Decision-making Process and Public Participation	41
The Impact of Public Participation	42
5. Conclusion	44
6. References	45
First Union - CoreStates Financial	45
Westpac - Bank of Melbourne	45
UBS - SBC	45

1. Introduction

A number of questions are currently being raised in Canada about the economic benefits and social consequences of two major proposed bank mergers. The government is faced with the heavy responsibility of analysing these projects and approving them or not.

Several elements of the process to follow in order to reach a decision in the best interests of the general public are already in place. In particular, the respective roles of the Competition Bureau, the Office of the Superintendent of Financial Institutions Canada and the Department of Finance have been defined.

The question still remains, however, of knowing to what extent public involvement would be appropriate in this decision-making process.

The following report is intended to help the Task Force on the Future of the Canadian Financial Services Sector consider this question. It presents three case studies of recent foreign bank mergers or acquisitions that included various forms of public participation.

The three merger case studies are First Union Corporation and CoreStates Financial Corporation in the United States, Westpac Banking Corporation and the Bank of Melbourne Limited in Australia, and the Union Bank of Switzerland and Swiss Bank Corporation in Switzerland.

The following outline is used for each case: the parties to the merger are described first, followed by the responsible regulatory authority, the decision-making process and forms of public participation, the decision made and the impact of public participation on it. The conclusion summarizes the main results of the review and suggests implications for Canada.

2. The Case of the First Union Corporation and CoreStates Financial Corporation Merger, United States

The Parties to the Merger

Under American law, First Union Corporation is a financial holding company with headquarters in Charlotte, North Carolina. First Union has consolidated assets of US \$157.3 billion that represent about 3.2 percent of the assets of insured banks in the United States, placing it sixth among American commercial banks.

In late 1997, First Union requested a merger with CoreStates Financial Corporation, resulting in the acquisition of its affiliates, notably CoreStates Bank of Pennsylvania, CoreStates Bank of Delaware, its banking affiliates abroad and its non-banking affiliates.

CoreStates is headquartered in Philadelphia and has consolidated assets of US \$48.5 billion, about one percent of American banking assets, which puts it in 23rd place among American commercial banks.²⁷

Regulatory Authority

The Federal Reserve Bank is the regulatory authority that reviewed the merger request. It acted on the advice of the Justice Department, which is responsible for considering the impact on competition, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. Part of the work involved was delegated to the Federal Reserve Bank of Philadelphia.

The Decision-making Process and Public Participation

The Federal Reserve Bank had to consider three kinds of factors in reaching a decision. Firstly, it had to take into account the impact of the merger on the level of competition. In the second place, it had to assess the consequences of the transaction on the convenience and needs of customers. Finally, it had to ensure that the merged entity would have the financial and managerial resources that it needed for its new mission.

Although the Federal Reserve Bank and the Justice Department had the necessary authority to involve the public in the review process, they did not initially plan to resort to this recourse in the current case.

²⁷ On May 29, 1998, the American dollar was worth \$Can1.4545. The assets of the First Union were therefore equal to \$Can228 billion and those of CoreStates, \$Can70 billion.

It was only after much public pressure and the personal intervention of Senator Arlen Specter with the Federal Reserve Bank that it decided to issue a public notice on February 25, 1998 to the effect that a public hearing would take place on March 13 at the FRB's Philadelphia offices. The organization of the hearing was entrusted to Michael E. Collins, senior vice-president for controls, regulatory activities and credit at the Philadelphia Federal Reserve Bank.

The ostensible purpose of the hearing was to gather information that could contribute to the review of the three relevant factors: level of competition, impact on clients and evaluation of the company's human and financial resources.

Anyone who wanted to make a presentation during the public hearing was asked to submit a written request to Vice-President Collins before 5:00 p.m. on March 5, 1998 and include three pieces of information: i) a brief statement of the nature of the presentation and the time required, ii) the address and telephone number of the applicant and iii) an indication of any special needs such as translation or handicapped assistance.

An agenda was drawn up for the March 13 hearing. The agenda called for the meeting to start at 9:00 a.m. and end at 8:00 p.m. at the latest. Witnesses were grouped together in 21 panels and an open session at the end of the day was provided for those who had not reserved time in the program.

The hearing took place as planned on March 13 in Philadelphia. We obtained a copy of the transcription, which runs to 590 pages. We will attempt to summarize what was certainly a very busy day in a few pages.

The director of the Federal Reserve Bank Community and Consumer Affairs Division, Griffith Garwood, chaired the public hearing.

A number of officials attended the hearing, including:

Alice M. Rivlin, Vice-President, Federal Reserve Bank (FRB)
Scott Alvarez, Associate General Counsel, Legal Division, FRB
Michael E. Collins, Senior Vice-President, FRB, Philadelphia
P.A.L. Nunley, Associate General Counsel, FRB, Richmond
Stephen Cross, Assistant Comptroller for Community Affairs and Consumer Policy, Office of the Comptroller of the Currency
Michael Bylsma, Director, Community and Consumer Affairs Act, Office of the Comptroller of the Currency

The meeting began with several interventions from a participant who complained about the way the hearing had been organized, problems in getting to the right office and the need to sign a register upon arrival.

After the chairman introduced the hearing and the officials who were present, a lawyer representing six community groups intervened to give notice that the groups objected not only to the planned merger itself but also to the way in which the hearing had been organized. He raised three points in particular: i) the Chairman and Chief Executive Officer of First Union had not

been invited and could not be questioned; ii) participants had not been able to obtain certain requested information to substantiate their submissions; and iii) a request for the chairman to ask witnesses if they had received any financial assistance from First Union before they made their presentations had been turned down. The chairman had refused to ask witnesses such a question. Disclosure would be at the discretion of each witness.

John R. Georgius, President of First Union, then took about 15 minutes to introduce his company and the planned merger with CoreStates.

The 21 groups of witnesses then appeared. We will now summarize their interventions.

The wide variety of participants was an interesting feature. They included:

- i) politicians (senators, congressman, the mayors of Philadelphia and Charleston);
- ii) business people (President of the Greater Philadelphia Chamber of Commerce);
- iii) lawyers representing groups;
- iv) representatives of ethnic associations;
- v) representatives of CoreStates employees;
- vi) many representatives (including a priest) of community groups and low-rent housing projects;
- vii) private citizens who spoke on their own behalf.

The geographic origin of participants can be broken down as follows: most of the witnesses came from the Philadelphia area but a significant number (between 25 and 35 percent) came from outside the region; the majority of external witnesses, with the exception of two groups, came to present testimony in favour of First Union and had obviously obtained assistance from the company to do this. The assistance involved providing witnesses with a framework for their testimony and defraying the costs of their stay.

Philadelphia-area witnesses can be divided into three groups: those in favour; those against but who believed the transaction was inevitable and who wanted to minimize any negative impact; and those who were clearly against and who were trying desperately to block the transaction.

It should be noted that in the ten-week run-up to the hearing, First Union organized no fewer than 100 meetings with community groups with whom they tried, and often succeeded, to sign agreements under the *Community Reinvestment Act*. A number of local groups who came to testify in favour of First Union did so after signing such agreements.

The concerns of those opposed to the merger centred on the following topics:

- excessive concentration and impact on the cost of financial services;

- negative impact on the closing of branches and physical accessibility (commuting distance for low-income people);
- low-cost financial services for low-income people;
- impact of the merger on jobs;
- discrimination in the granting of credit;
- housing finance in depressed areas;
- insensitivity of a bank with headquarters remote from local needs and characteristics.

Many witnesses were concerned that First Union had just acquired a chain of businesses called "The Money Store", which cashed cheques and made high-risk loans. They thus feared that First Union would close traditional bank branches in depressed neighbourhoods to help make the market penetration of this chain's institutions easier.

Lastly, some witnesses referred to some disquieting financial features of the transaction, like the fact that CoreStates shares were traded at more than five times their book value and that the CoreStates chairman received a departure bonus alleged to be in order of US \$46 million.

In short, the hearing that ended around 7:30 p.m. allowed some 80 witnesses to put forward very different points of view.

Lastly, the Federal Reserve Bank received some 235 comments during the consultation period.

The Impact of Public Participation

We believe that public participation in this case had three types of impact that can be described chronologically as having taken place before, during and after the hearing and the consultation period.

Before the analysis, we should note that First Union, the company launching the take-over, was not a passive spectator in this process but participated very actively by organizing presentations from satisfied clients, negotiating agreements with community groups in what would be its new territory and defending the transaction at the start of the hearing.

Thus, even before the hearing, the public participation process had given community groups some bargaining power which some seem to have used to their advantage by negotiating their agreement to the planned merger.

The hearing itself provided a safety valve that allowed a number of groups to publicly express their opposition and frustration. In this sense, the hearing alone provided some relief and gratification. However, as we have noted, the process itself, which seems to have been somewhat improvised, generated criticism and dissatisfaction.

On April 13, 1998, the Federal Reserve Bank announced that it was authorizing the merger between the two groups, subject to certain conditions that included the divestiture of some branches. The 60-page text describing the reasoning and the decision of the FRB was noteworthy in the care it took to address and respond to the concerns expressed by the public during the consultation period. On the other hand, it is also clear that the many objections raised did not succeed in halting the transaction and, at best, only achieved a few concessions.

3. The Case of the Westpac Banking Corporation and Bank of Melbourne Limited Merger, Australia

The Parties to the Merger

Westpac Banking Corporation has assets of \$Aus118 billion²⁸ and employs 31,000 people. Its activities are mainly concentrated in Australia and New Zealand but it has also expanded somewhat into Asia and the rest of the Pacific. The company is pursuing an aggressive acquisition strategy. In 1996, it acquired Challenge Bank, the Trust Bank of New Zealand and AMPAC Life. On April 3, 1997, it announced its intention to merge with the Bank of Melbourne Limited.

Regulatory Authority

The Australian Competition and Consumer Commission (ACCC) was the regulatory authority responsible for considering the merger request. This agency has the status of an independent authority. For governmental purposes, it reports to the Department of the Treasury on matters related to business practice and prices and to the authority responsible for consumer affairs on issues affecting consumers. The ACCC is the only Australian agency responsible for enforcing the *Competition Policy Reform Act* (1995).

The Decision-making Process and Public Participation

Parties to a merger may request approval in two ways: informal notice or formal inquiry. In the case under review, the parties requested an informal notice. Under this procedure, the ACCC may undertake public consultations but must preserve the confidentiality of participants and their submissions.

In the final report outlining its decision, the ACCC stated:

“Since that time, the Commission has conducted comprehensive market inquiries in the banking industry, particularly in Victoria. The Commission sought comments from over one hundred organizations, from which over thirty substantive responses were received. In addition, the Commission received around thirty unsolicited submissions from other interested parties wishing to comment on the merger proposal. The Commission has carefully examined all submissions received to help it assess both the anti-competitive detriment of the merger proposal and suggestions as to the possible means of alleviating such detriment.

²⁸ On May 29, 1998, the Australian dollar was worth \$Can0.90. The assets of Westpac were therefore equal to \$Can106 billion.

The Commission's decision is based on its consideration of all submissions received, as well as other information gathered through its own research and analysis."²⁹

David Smith, senior assistant commissioner of the ACCC, who was responsible for this dossier, provided us with further information in a telephone conversation. Consumers associations, business people and representatives of national and regional banks presented the submissions.

The content of the submissions can be summarized as follows: customers of banking services, consumers or companies were worried about the negative effects of increasing concentration on prices; large banks pleaded that the mergers were necessary to rationalize production and reduce costs; smaller regional banks were, in general, opposed to the merger and stressed that the situation threatened their existence; and lastly, financial institutions that considered themselves to be future acquisition targets proved to be in favour of the merger.

The ACCC's market analysis considered six categories of financial services: deposits, housing loans, personal loans, small business loans, credit cards and transaction services. The Commission came to the conclusion that, in the deposits and transaction services market, the 40-percent market-share benchmark for a company and the 75-percent four-company concentration ratio had been exceeded.

Nonetheless, the ACCC decided that it would not launch a formal inquiry or object to the merger. However, to counter situations of excessive concentration in the deposit and transaction services markets, the ACCC's final decision compelled Westpac to make its automated teller machines and point-of-sale terminals accessible to its competitors.

The Impact of Public Participation

At the outset, it would seem that the positions taken by the various participants were predictable. However, Mr. Smith told us that information on the payment system operation and its economic characteristics provided by the regional banks was very useful to the ACCC.

Mr. Smith went on to say that the ACCC would not have had any other way of obtaining this information. Data about the payment system were important in formulating the decision and imposing the condition on Westpac to share its equipment. For Mr. Smith, therefore, the consultation exercise contributed essential elements to the design of an acceptable solution for everyone.

²⁹ Australian Competition and Consumer Commission. *Westpac Banking Corporation / Bank of Melbourne Limited - Background to Decision on Merger Proposal*, 1997, p.1

4. The Case of the Union Bank of Switzerland and Swiss Bank Corporation Merger, Switzerland

The Parties to the Merger

On December 8, 1997, the Union Bank of Switzerland and the Swiss Bank Corporation announced their intention to merge. The Union Bank of Switzerland is a financial corporation with assets of 514 billion Swiss francs, a network of 389 places of business and 28,641 employees. It also manages funds of 730 billion Swiss francs.³⁰

The Swiss Bank Corporation, on the other hand, had assets of 407 billion Swiss francs, a network of 365 places of business and 26,833 employees. It managed funds totalling 590 billion Swiss francs.

Regulatory Authority

The regulatory authority responsible for reviewing the proposed merger was the Commission de la concurrence (competition commission). The Commission is an independent agency of 12 people that reports to the Département fédéral de l'économie (federal department of the economy). Its chairman, Pierre Tercier, is a lawyer and professor of law at the University of Fribourg.

The Decision-making Process and Public Participation

We first made contact with Charles Larabie, Embassy of Canada Commercial Counsellor in Berne who sent us an excerpt from the Swiss *Cartel Act* in which section 43 entitled *Participation of Third Parties In The Investigation* suggested that the decision-making process could include some public participation. Indeed, section 43 (1) identifies the parties that can take part in an investigation dealing with trade restrictions. This information led to our interest in the UBS-SBC case.

We contacted the Commission chairman, Pierre Tercier, for further details and he provided us with the following information.

The Commission used a two-stage process comprising a preliminary examination and a full review. In the preliminary examination, the Commission had to decide if there were any indication that a dominant market position was either being created or reinforced. It had a one-month period from the date of full notification of the merger transaction to do this. If indications of the creation or reinforcement of a dominant position existed, the Commission would proceed to a full review.

³⁰ On May 29, 1998, the Swiss franc was worth \$Can0.982. Therefore the assets of the UBS was equal to \$Can505 billion and those of SBS, \$Can400 billion.

The Commission published a press release on February 5, 1998 providing the following clarifications of a full review.

“The competitors as well as potential partners in the exchange will be consulted. The Commission may call on outside experts.

The merger's impact on Swiss markets must be examined. However, this does not simply mean adding together the market shares of participating companies and totalling their competitive impact. Indeed, effective competition may exist in markets that only have a few participants. This is why, from a development perspective, we must take into account not only the consequences that future barriers to market entry (legal or real), might have on the behaviour of potential competitors, but also conditions of supply and demand. Market development, the international competitive position of companies and the financial strength of competitors (potential and current) are also to be included in the evaluation of the merger's impact. It is only by considering these issues that we will be able to clearly determine the effects of the merger.

.....

It should be noted that the criteria for invoking the Swiss *Cartel Act* are stricter than European or American competition laws. Legislators did not intend to prohibit mergers save for exceptional cases.”³¹

The Commission had four months in which to carry out a full review. For the UBS-SBC merger, full notification was forwarded to the Commission in January 12, 1998. On February 2, the Commission announced that it had to conduct a full review and that it would not grant provisional approval to the merger in relation the Swiss business of both banks. This decision did not, however, compromise the final decision in any way.

In a personal letter, the chairman stated:

“The *Cartel Act* does not provide for the possibility that third parties could participate in the procedure with respect to controlling mergers.”³² Mr. Tercier referred to section 43 (4) of the *Cartel Act*.

The Impact of Public Participation

Thus, although the legal process did not result in public participation, we can nonetheless claim that the public found a number of ways to express its wishes and take part in the decision-making process.

³¹ Competition Commission. *Press Release: Procedure for controlling mergers under Swiss cartel law*, Berne, February 5, 1998

³² Letter of April 27, 1998, from Pierre Tercier, Chairman of the Commission de la concurrence to Jean Roy.

Firstly, there was some protest action as demonstrated by UBS and SBC bank customers who decided to transfer their savings to other institutions.

Secondly, both banks voluntarily involved their employees in the restructuring plans. Staff committees in each of the banks and the Association suisse des employés de banques (Swiss bank employees' association) took part in negotiating an agreement whose implementation was to be overseen by a joint commission for a period of four years following the merger.

Thirdly, a number of members of the Swiss Parliament spoke to the Conseil des États (council of states) on behalf of the public and expressed public questions and fears about the impact that the merger would have on access and prices of financial services for Swiss citizens.

On May 5, the Commission de la concurrence announced that it was approving the merger of the UBS-SBC banks, albeit with the following four important conditions:

- 1) to sell 25 banking points of service;
- 2) to sell three subsidiaries;
- 3) to continue to participate in joint Swiss banking institutions; and
- 4) to maintain corporate loans accumulated by both institutions without any restrictions until the end of 2004.

UBS accepted the imposed conditions and thereby ended the full review process.

Given the means the public used to express its views, the indirect pressure it exerted and without a report to explain the decision³³, it is difficult to determine what impact the public had on this decision.

³³ The Commission de la concurrence will publish an analysis of the decision next July in its publication, *Competition Law and Policy*.

5. Conclusion

This report has examined three cases of foreign bank mergers. Its purpose was to identify the place of public participation within the decision-making process.

In the United States, the case of the First Union Corporation and CoreStates Financial Corporation merger resulted in a consultation period and, after popular and political pressure, a public hearing. The major benefit of this hearing will probably be to have given some bargaining power to community groups who were able to obtain financial support for their cause in return for supporting the merger.

In Australia, the informal process that was adopted consisted mainly of soliciting and receiving confidential submissions. Nevertheless, authorities claimed they had received relevant information from competing banks that was used to formulate the conditions imposed on the planned merger.

In Switzerland, contrary to our initial information, the *Cartel Act* does not provide for the participation of third parties in the examination of mergers or merger plans. The public must therefore resort to indirect means to express its views or exert pressure.

We can thus see that formal and systematic public participation in the process of approving bank mergers is not the international norm. Many countries including France, Germany and Holland do not have any provision for public participation in such decisions. In the countries that we have reviewed, public participation procedures were either exceptional or partial.

What should we make of the foreign experience in Canada? No hard and fast conclusion emerges. The public realizes the special economic importance of bank mergers and wants to make its voice heard to a certain extent. The Canadian government and elected representatives have recognized this fact and a number of consultative processes have taken place or will occur. The Task Force on the Future of the Canadian Financial Services Sector, the Competition Bureau, the Liberal Party of Canada's Working Group On Financial Services and the public hearings scheduled for the autumn of 1998 by the Standing Senate Committee on Banking, Trade and Commerce can be mentioned in this connection. Thus the Canadian public will already have had a number of opportunities to express its views on how its financial system should develop.

Under these circumstances, will it be necessary to provide another opportunity for the public to participate in the decision-making process? It is difficult to say at the moment. However, a prudent approach would seem to be to plan for this eventuality and to be prepared if, as in the United States, public pressure requires it. In this respect, the flexible Australian approach is especially interesting since it provides for either an informal or formal approach, depending on need, and allows for recourse to targeted or spontaneous consultation, without necessarily holding public hearings. It is up to Canada, therefore, to learn from these foreign experiences and adapt their lessons to our own context and culture.

6. References

First Union - CoreStates Financial

Board of Governors of the Federal Reserve System. "Regulation Y: Banking Holding Companies and Change in Bank Control", 95p.

Board of Governors of the Federal Reserve System. "Regulation BB: Community Reinvestment", 29p.

Federal Reserve Bank of Philadelphia. "Notice of Public Meeting", circular letter dated March 2 1998, 6p.

Federal Reserve Bank of Philadelphia. "Public Meeting Regarding First Union Corp. and CoreStates Financial Corp., Philadelphia, March 13 1998, Tentative Agenda", 6p.

Federal Reserve Bank of Philadelphia. "Transcript of the Public Meeting Regarding First Union Corp. and CoreStates Financial Corp., Philadelphia, March 13 1998", 590p.

Federal Reserve System. "First Union Corporation - Order Approving the Merger of Bank Holding Companies", April 13 1998, 60p.

Westpac - Bank of Melbourne

Australian Competition and Consumer Commission. *An Introduction to the Revised ACCC Merger Guidelines*, 26p.

Australian Competition and Consumer Commission. "Westpac Banking Corporation / Bank of Melbourne Limited - Background to Decision on Merger Proposal", July 1997, 38p.

Westpac Banking Corporation / Bank of Melbourne Limited. "Undertaking given to the Australian Competition and Consumer Commission", July 1997, 13p.

Westpac Banking Corporation. *Annual Report 1997*, 136p.

UBS - SBC

Swiss Bank Corporation - Union Bank of Switzerland, "Press Release: UBS and SBC to merge", December 8 1997, 11p.

Swiss Bank Corporation. "Merger partners SBC and UBS agree innovative redundancy plan", January 30 1998, 3p.

Swiss Federal Government. "*Federal Cartel Act* - Section 43: Participation of third parties in investigations", 1p.

Conseil des États, UBS/SBC Merger

Intervention Brunner, Christiane, 4p., #97.3601,

Intervention, Groupe socialiste, 3p., #97.3671,

Intervention, Onken, 6p., #97.3679,

Question, Strahm, 4p., #97.5225,

Letter from Pierre Tercier, chairman of the Commission de la concurrence to Jean Roy, dated April 27, 1998

Département fédéral de l'économie. Press Releases:

"The Commission de la concurrence decides on an review of the UBS / SBC merger",
February 2, 1998

"Procedure for controlling mergers in Swiss cartel law", February 5, 1998

"UBS-SBC merger: OFDE Director meets representatives of the new UBS for the second time",
February 13, 1998

"The Commission de la concurrence approves the UBS / SBC merger under certain conditions",
May 5, 1998

